No. 21020

In the

United States Court of Appeals

For the Ninth Circuit

ELISHA EDWARDS,
Appellant,

vs.

PACIFIC FRUIT EXPRESS COMPANY, a Utah Corporation,
Appellee.

Appellee's Brief

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

RULES

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STATEMENT OF JURISDICTION

Jurisdiction of this court rests upon 28 U.S.C. § 1291, reading in part as follows:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

Jurisdiction of the district court rested upon 28 U.S.C. § 1331, reading in part as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

and upon the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51, et seq. (1952), and in particular upon § 56 of the act providing in part, "Under this chapter an action may be brought in a district court of the United States. . ."

Appellant's complaint in the district court alleges appellee is "a common carrier by Railroad within the meaning of Title 45 U.S.C. 51 . . ." (Transcript of Record, hereinafter T.R., p. 1) alleges employment of appellant (T.R. 1), alleges injury to him through the fault of Appellee (T.R. 2), and alleges damages of $1,000,000. (T.R. 3).

STATEMENT OF THE CASE

The question involved is: Is appellee, Pacific Fruit Express Company, a common carrier by railroad engaging in interstate commerce within the meaning of the Federal Employers' Liability Act?

The question is raised in the following manner:

Complaint was filed November 24, 1965, (T.R. 1) alleging appellee's status as a common carrier by rail subject to the Federal Employers' Liability Act. Answer was filed January 7, 1966, (T.R. 4) denying such status and the charging allegations of the complaint. Defendant filed a motion for summary judgment on January 20, 1966. (T.R. 10) The motion was supported by an affidavit showing the nature and function of appellee's business as a refrigerator car company and showing its corporate status and lack of function as a rail common carrier. (T.R. 34). The motion was heard by the Honorable Albert C. Wollenberg and summary judgment granted March 18, 1966, and entered March 23, 1966. The summary judgment finds "That the defendant Pacific Fruit Express Company was not at the time of plaintiff's injury a common carrier by railroad subject to

the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq."

Such a summary judgment is a final judgment within the meaning of 28 U.S.C. § 1291, the statute conferring jurisdiction on this Court. *Poss v. Lieberman,* 299 F.2d 358, (2nd Cir. 1962) *cert. den'd;* 370 U.S. 944; 82 Sup.Ct. 1585; 8 L.Ed.2d 810.

Appellant's Notice of Appeal was filed April 7, 1966, within the time allowed for taking an appeal. Fed. R. Civ. P. 73.

SUMMARY OF ARGUMENT

I. Congress and the Courts have consistently recognized refrigerator car companies as conducting a business distinct from that of a common carrier by railroad and not subject to the Federal Employers' Liability Act.

II. There are no significant factual changes in appellee's operations from that shown in prior adjudications holding appellee and other refrigerator car companies not subject to the Federal Employers' Liability Act.

III. Neither the Terminal Company cases nor cases from other activities closely related to railroading provide good authority for the decision of this case.

ARGUMENT

I. Congress and the Courts have consistently recognized refrigerator car companies as conducting a business distinct from that of a common carrier by railroad and not subject to the Federal Employers' Liability Act.

In construing the Federal Employers' Liability Act, 35 Stat. 65 (1908), 45 U.S.C. § 51 et. seq. (1952), the courts have consistently recognized that certain areas of activity while closely related to railroading, are yet not the business of a common carrier by rail and not subject to the Federal

Employers' Liability Act. Examples of these areas are sleeping car companies, *Robinson v. Baltimore & Ohio R. R. Co.* (1914); 237 U.S. 84; 35 Sup.Ct. 491, 59 L.Ed. 849; express companies, *Wells Fargo & Co. v. Taylor,* (1920) 254 U.S. 175; 41 Sup.Ct. 93; 65 L.Ed. 205; *Jones v. New York Cent. R. R. Co.* (6th Cir. 1950); 182 F.2d 326; freight forwarders, *Latsko v. National Carloading Corp.,* 192 F.2d 905 (7th Cir. 1951).

The seminal case on refrigerator car companies is *Gaulden v. Southern Pac. Co.,* 78 F.Supp. 651 (N. D. Calif. 1948), *aff'd* 174 F.2d 1022 (9th Cir. 1949), a decision by the Honorable Louis Goodman. So far as appellee is able to discover this is the first case expressly considering the status of refrigerator car companies under the Federal Employers' Liability Act. In that suit for personal injuries plaintiff, an iceman employed by Pacific Fruit Express Company, sought to maintain an action under the Federal Employers' Liability Act against both his employer the Pacific Fruit Express Company, and Southern Pacific Company, a railroad common carrier and one of the two stockholders of Pacific Fruit Express Company. The accident happened at the icing yard and plant owned and operated by Pacific Fruit Express Company at Bakersfield. After a thorough review of all factors which distinguish Pacific Fruit Express Company from a railroad common carrier (e.g. lack of control of the movement of refrigerator cars, possession of no rail motive power, ownership of shop tracks and unloading tracks only, etc.), the court gives specific consideration to whether a refrigerator car company is a common carrier by railroad within the Federal Employers' Liability Act. The Court analyzes the problem with such clarity that this portion of the opinion is here set forth in full.

"Plaintiff contends that the Pacific Fruit Express Company is a common carrier by railroad and hence within the reach of the Federal Employers' Liability Act. The Court holds to the contrary. The act itself subjects freight common carriers by railroad, while engaging in commerce between any of the several states or territories, to liability in damages to any person suffering injury while employed by such carrier in such commerce. 45 U.S.C.A. § 51. There does not seem to be any doubt at all that the business of renting refrigerator cars to railroads or shippers and providing protective service in the transportation of perishable commodities is not of itself that of a common carrier by railroad. *Ellis v. Interstate Commerce Commissioner,* 237 U.S. 434, 35 S.Ct. 645, 59 L.Ed. 1036; *United States v. Fruit Growers Express Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.Ed. 739; *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 41 S.Ct. 93, 65 L.Ed. 205; *United States ex rel. Chicago Refrigerator Company v. Interstate Commerce Com.,* 265 U.S. 292, 44 S.Ct. 558, 68 L.Ed. 1024; *Reynolds v. Addison Miller Co.,* 143 Wash. 271, 255 P. 110.

"The Federal Employers' Liability Act was amended in 1939. At that time, despite earlier decisions, some of which have been cited, no effort was made to include refrigerator companies within its terms. Congressional inactivity in that regard must be given its usual implication, i.e. acquiescence in the judicial rulings. Federal legislation concerning the social security of employees employed in Interstate Commerce specially included employees of Refrigerator Companies within the meaning of the term carrier, thus indicating Congressional awareness of the actualities. Thus the terms of the statute, plus the judicial interpretations of its meaning and the obvious knowledge of the Congress over a long period of time as to such judicial pronouncements, make it abundantly clear that Pacific Fruit Express Company itself is not a common carrier by rail and not subject to the provisions of the Act." (pp. 654-55)

This express consideration of whether refrigerator car companies are within the Federal Employers' Liability Act is in direct contradiction to the assertion at the top of page 10 of Appellant's Opening Brief (hereinafter "brief") that "different questions were before the Court in *Gaulden*".

Judge Goodman's analysis and opinion in *Gaulden* have proved so outstanding and persuasive that every court considering the problem since has not only arrived at the same result, but either in part or in whole adopted the *Gaulden* opinion as its own. These courts include the following:

(1) This court, which in a *per curiam* opinion, affirmed the judgment on the grounds and for the reasons stated in the opinion of the trial court. 174 F.2d 1022 (9th Cir. 1949).

(2) The United States Court of Appeals for the Third Circuit in *Hetman v. Fruit Growers Express Co.*, 346 F.2d 947 (3rd Cir. 1965). In this F. E. L. A. action decedent was an employee of an independent contractor performing icing services for the defendant refrigerator car company. One of the questions raised was whether the defendant was "a common carrier by railroad." The Court answers, no, and affirms the action of the trial court in granting summary judgment for defendant.

(3) The Courts of California in *Aguirre v. Southern Pac. Co.*, 232 Cal.App.2d 636; 43 Cal.Rptr. 73. A summary judgment was also affirmed on appeal in this case. Plaintiff was an employee of appellee at Roseville. The Court gives express consideration to whether P. F. E. is a common carrier by rail (p. 643) and on the basis of its own consideration of the authorities concludes it is not.

(4) The Supreme Court of Utah in *Moleton v. Union Pac. R. R. Co.*, 118 Ut. 107, 219 P.2d 1080, *cert. den'd;* 340 U.S. 932, 71 Sup.Ct. 495; 95 L.Ed. 672. This case was dismissed in the trial court on a non-suit and affirmed on appeal. Plaintiff was an employee of P.F.E.

Co. at Laramie, but working in the yards of Union Pacific R. R. Co. The court holds P. F. E. is not a common carrier by rail within the meaning of the Federal Employers' Liability Act.

So far as appellee knows these are all the cases and opinions in which the question raised is the status of refrigerator car companies under the F. E. L. A. They adopt *Gaulden* and arrive at the same result, and there are no decided cases holding a refrigerator car company subject to the Federal Employers' Liability Act.

Since the *Gaulden* opinion has been so influential, it may be well to amplify and expand certain of the considerations there set forth. It is important to note, as Judge Goodman points out, that in the few years immediately preceding the 1939 amendments to the Federal Employers' Liability Act, Congress enacted the Railway Labor Act, 45 U.S.C. § 151 (1926), the Railroad Retirement Act of 1937, 45 U.S.C. § 228(a) (1937), the Railroad Unemployment Insurance Act, 45 U.S.C. § 351 (1938), and the Railroad Retirement Tax Act (1937), Internal Revenue Code of 1954, Section 3231.

As to the Railway Labor Act, as originally enacted its coverage did not specifically include refrigerator car companies. Railway Labor Act § 1, ch. 1 § 1, 44 Stat. 577 (1926). In 1934, the act was amended; Section 1, which contains definitions, was amended adding the wording "any company . . . which operates any equipment or facilities or performs any service . . . in connection with the . . . refrigeration or icing . . . of property transported by railroad . . ." 48 Stat. 1185, (1934) 45 U.S.C. § 151. Congress thus explicitly recognized refrigerator car companies as a distinct type of activity. Moreover, Congress recognized that if this type of activity were to be included within the Railway Labor Act

it would have to be by way of amendment and Congress indicated its willingness to proceed in this manner.

In 1934 Congress not only amended the Railway Labor Act, but also enacted the Railroad Retirement Act of 1934 (48 Stat. 1283). The definition of "carrier" contained in that year's amendment to the Railway Labor Act was carried over in its entirety to the definition of "employer" found in Section 1 of the Retirement Act, including the reference to companies performing services in connection with refrigeration or icing. The 1934 Retirement Act, however, was held unconstitutional. Congress then separated the retirement and taxing provisions in the Act in an effort to overcome the constitutional objection. Two statutes were passed incorporating essentially the same definition of employer, the Railroad Retirement Act (1935), 49 Stat. 967, and the Carriers' Taxing Act, 1935, 49 Stat. 974, both with language as above specifically including refrigerator car companies. The 1935 Taxing Act was also held unconstitutional. In 1937 Congress passed the present Railroad Retirement Act 45 U.S.C. § 228 and Railroad Retirement Tax Act, Internal Revenue Code of 1954 § 3231, both of which specifically included refrigerator car companies.

The Railroad Unemployment Insurance Act, 45 U.S.C. § 351, was passed in 1938 and the relevant definitions and coverage are identical to those contained in the Retirement Acts just reviewed.

Thus between 1934 and 1938, the year before the Federal Employers' Liability Act was amended, Congress passed six major items of legislation (including bills repealed or held unconstitutional) and passed an amendment to an existing major statute (the Railway Labor Act) in all of which refrigerator car companies are specifically included and all of which such companies are recognized as a separate, distinct type of activity.

In 1939 the Federal Employers' Liability Act was amended and its scope considerably expanded. Ch. 685 § 1 (1939), 35 Stat. 65. At that time Congress considered expanding the Act to include some of the areas closely related to railroading, in that the amendment originally proposed broadening the coverage of the act to include express, freight forwarding, and sleeping car companies. The report of the Senate Judiciary Committee states:

> "Upon the hearings it was clearly shown that there is neither necessity nor demand for the inclusion of these companies in the act."

They were therefore excluded. It is to be emphasized that there was no attempt to include refrigerator car companies at this time. The history of the 1939 amendment to the Federal Employers' Liability Act thus discloses both Congressional disinclination to extend the coverage of the act and the lack of any demand or expression of need that it be extended to refrigerator car companies.

The history of judicial construction and statutory amendment of the Interstate Commerce Act 24 Stat. 379 (1887), 49 U.S.C. § 1 et seq. is likewise illuminating. Appellant has urged the similarity of language between the Interstate Commerce Act and the Federal Employers' Liability Act. (P. 19 Brief). In 1914 in *Ellis v. Interstate Commerce Commission,* 237 U.S. 434; 355 Sup. Ct. 645; 59 L.Ed. 1036 the question raised was whether Armour Car Lines was a common carrier subject to the act. The language relied upon to sustain that position was the same language cited by appellant herein; namely, the definition of "transportation" in Section 1 of the act which includes cars and services in connection with refrigeration or icing. Armour Car Lines was described as a company owning, manufacturing and maintaining refrigerator, tank and box cars, owning and operat-

ing icing stations, and furnishing "cars for the shipment of perishable fruits, etc., and keeps them iced . . ." (p. 443). In an opinion by Mr. Justice Holmes the notion that refrigerator car companies were subject to the act is repudiated:

> It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission is over the railroads that are subject to the act.

In 1928 in *United States v. Fruit Growers Express,* 279 U.S. 363; 49 Sup. Ct. 374; 73 L.Ed 739, the United States sought to punish the defendant, a refrigerator car company, for false reporting under section 20 (7) of the Interstate Commerce Act. The defendant was held not subject to the act and its penalties.

There was thus no doubt that refrigerator car companies were not subject to the Interstate Commerce Act.

In the Transportation Act of 1940, 54 Stat. 917, Congress saw fit to add Section 20(6) to the Interstate Commerce Act. It is only by virtue of this section that the Interstate Commerce Commission has jurisdiction to inspect books and prescribe forms of account for companies which "furnish cars for protective service against heat or cold." This section is the Commission's only source of authority over refrigerator car companies.

In summary, therefore, both before and after the 1939 amendments to the Federal Employers' Liability Act, in other areas of transportation legislation (Namely the Railway Labor Act and the Interstate Commerce Act) Congress has amended acts to specifically include refrigerator car companies. At the time of the 1939 amendments to the Federal

Employers' Liability Act consideration was given to expanding its scope, but there was neither need nor demand, on the part of employees of refrigerator car companies or any other rail-related activities. In addition, in the years immediately preceding the 1939 amendments Congress enacted major legislation in the transportation field which specifically recognizes and includes refrigerator car companies as a distinct type of activity.

The full scope of Judge Goodman's reasoning in *Gaulden* can now be seen. To argue at this date that the employees of refrigerator car companies should by judicial construction be placed within the Federal Employers' Liability Act runs completely contrary to the trend and sense of these cases, statutes and amendments.

II. There are no significant factual changes in appellee's operations from that shown in prior adjudications holding appellee and other refrigerator car companies as not being subject to the Federal Employers' Liability Act.

Appellant contends: "Secondly, the nature of appellee's business is now different, and it was not even presented fully to the District Court in 1948." (Brief p. 10) and, "The facts presently before this Court are different in many crucial respects from those recited in the *Gaulden* opinion notwithstanding the fact that the same appellee is involved." (Brief p. 12).

Appellee contends to the contrary that there are no significant factual changes in its operations since prior adjudications and that the essence of its business remains the renting of refrigerator cars and the furnishing of heat and cold protective services. (T.R. 34) The affidavit of W. G. Cranmer in support of the motion for summary judgment also shows:

"P. F. E. . . . is a supplier of services and vehicles to railroads, and does not hold itself out to render transportation service" (T.R. 35);

"Pacific Fruit Express does not issue bills of lading nor does it publish tariffs . . ." (T.R. 35)

An analysis of appellant's Brief shows two principal areas in which appellant claims appellee's operations are different from those that existed at the time of the *Gaulden* opinion. The first of these is that appellee has acquired refrigerated vans and other equipment for service in the piggyback field. The second is that appellee "serves the public directly" in that it furnishes car distribution service, diversion, and passing services, and takes orders for heat and cold protective service. Each of these will be taken up separately.

As to the question of acquisition of refrigerated vans, appellant recites in its statement of facts (Brief p. 4) that since June 1961 appellee has entered the piggyback rail field by acquiring refrigerated vans for the movement of commodities from shipper to terminal, etc. Appellant then sets forth the contention in a footnote at the bottom of page 14 that, "This therefore represents a change in appellee's operations since *Gaulden* . . ." In the first place, the acquisition of this type of equipment is entirely consistent with and does not show a change in the nature of appellee's business. That business has been and is now the furnishing of suitable vehicles for the carriage of perishable food stuffs and the furnishing of heat and cold protective services to these and other like vehicles. Whether the vehicles be railroad "reefer" cars or motor carrier type vans would seem immaterial in determining the essential nature of appellee's business, the essence of which is (insofar as concerned here) the renting of the appropriate container. In the second place, at least one court has determined that the addition of this

type of equipment does not alter the character of appellee's buisness. In *Aguirre v. Southern Pac. Co.,* 232 Cal.App. 2d 636; 43 Cal.Rptr. 73, at page 640 the Court specifically takes note that, "P. F. E. also owns and lets a number of trailers under contracts with thirty-three (33) railroads . . ." The Court concludes, however, that as to these and other factual details appearing since the decision in *Gaulden,* "We have reviewed the *Gaulden* case with particularity. We do so because our views accord with the reasoning of Judge Goodman, which we adopt as a basis for our holding. The facts of the two cases are, as stated above, nearly identical. *Where new facts emerge in the case at bench we do not find them significant.*" (Page 646, Emphasis supplied.)

In the third place, as previously pointed out, in *Ellis v. Interstate Commerce Commission,* 237 U.S. 434, 35 Sup. Ct. 645; 59 L.Ed. 1036, the car line owned "refrigerator, tank and box cars," including cars for the transportation of perishables, but the Supreme Court of the United States absolutely rejects the suggestion that Armour Car Lines is a common carrier by rail. The character of the equipment owned, therefore, appears not to be decisive of this issue.

The matter of car distribution services is explained more fully in the literature attached to the declaration of Leland P. Jarnagin (T.R. 69). The literature states, "[Car distribution personnel] gather information about crop conditions and future need of cars in various loading territories so that they can arrange with the various railroads to move available cars to such loading territories so that they can arrange with the various railroads to move available cars to such loading territories at exactly the right times." (T.R. 74). This is again a function noted in *Aguirre v. Southern Pac. Co.,* 232 Cal. App. 2d 636; 43 C.R. 73, p. 640, but the court finds, "Where new facts emerge in the case at bench we do not find them significant." (p. 646). The truth of the

matter is that this is a function which is necessary and incidental to a car line company, but is hardly determinative of the character of the business.

As to the matter of furnishing diversion and passing services, appellant asserts at several places, that, "To serve the shipping public directly, appellee possesses 'offices and agencies in all principal western producing areas' . . ." (Brief, page 14); appellant also quotes material describing the diversion and passing services. (Brief page 16) It is apparently on the basis of these various offices and services that appellant asserts:

> "It [P. F. E.] cannot now insist that it does not deal directly with the shipping public." (Page 17.)

In the first place one should note that the test of being a common carrier by rail within the meaning of the Federal Employers' Liability Act is not whether one deals directly with the public. Thus Railway Express Company, The Pullman Company and other corporations in rail related activities obviously deal directly with the public, but this has not affected the holdings cited in the opening paragraphs of this argument, that these corporations and activities are not within the ambit of the Federal Employers' Liability Act. The same reasoning applies here. It would appear that furnishing of diversion and passing services is a small and incidental part of appellee's business of renting refrigerator cars and furnishing heat and cold protective services. However, to the extent that such services entail dealing directly with the public, this does not furnish a test of whether an entity is a common carrier by rail within the meaning of the F.E.L.A.

Moreover, provision of services much more far-reaching than this have been held by the Supreme Court not to constitute one a carrier by railroad. In *Chicago Refrigerator*

Co. v. I.C.C., (1923) 265 U.S. 292, 44 S. Ct. 558, 68 L.Ed. 1024 the refrigerator company attempted to bring itself within the operating income guarantees of the Transportation Act of 1920, which applied to "carriers by railroad." The court states, "The Car Company solicited freight from shippers . . . and exercised a degree of supervision over the shipment. . . .; a small percentage . . . of shipments . . . were re-billed on the forms [i.e., bills of lading] of the Car Company . . ." (P. 294). The court holds the car company is not a carrier by railroad, citing *Ellis v. I.C.C.,* and relying on the analogy to language in the Interstate Commerce Act. Surely if such services and contact with the public do not make one a carrier by railroad, then appellee's diversion and passing services cannot do so either.

Much of appellant's recitation of factual material concerning appellee's operations is not new material at all and has been considered by other courts and this court heretofore. This includes the recitations that appellee owns car shops, ice plants, tracks at such locations, two engines located at Roseville and Tucson, etc. (Brief pp. 4, 23, 25) See the description particularly in *Gaulden,* op. cit., p. 653. Appellant's constant reference to PFE as "the first family of perishable transportation" and as furnishing "the finest in perishable transportation service" (Brief, pp. 6, 13, 16, 23) is patently a make weight argument. Such slogans may or may not be effective advertising but they are hardly determinative of the factual nature of appellee's activities, and are certainly no substitute for tariffs and bills of lading (which PFE does not have—T.R. 35) which one supposes would be essential to a common carrier by rail holding itself out for service to the public.

A word needs to be said concerning the source and status before this court of much of the factual material asserted

by appellant. At several points in his brief, appellant has included material not within the record in this case. For example, on page 14 appellant refers to a random sampling of various phone directories. No such material is in the record in this case. Again, in a footnote on page 26 appellants refers to facts not contained in the record. Of even more concern, however, is the status of the materials attached to the declaration of Leland P. Jarnagin, submitted to the court as an affidavit in opposition to the motion for summary judgment. This is discussed by appellant in a footnote on page 13. It appears Mr. Jarnagin called at the office of Pacific Fruit Express Company in San Francisco and secured certain explanatory and advertising literature. This literature was then attached to Mr. Jarnagin's declaration and used as evidence of the facts and matters set forth in the literature. As appellant correctly notes, this material was submitted to the court at the time of the motion of summary judgment without objection on the part of appellee. However, that does not mean that the material can be appropriately considered by the court. It will be readily apparent that the matters asserted in advertising literature are not something that Mr. Jarnagin knows of his own personal knowledge and can present to the court under oath in the form of an affidavit. Affidavits in support of or in opposition to a motion for summary judgment must be made on personal knowledge, setting forth facts admissible in evidence and showing that the affiant is competent to testify to the matters stated therein. To the extent the affidavits do not contain such material they must be disregarded by the Court. Fed. R. Civ. P. 56.

III. Neither terminal company cases nor cases from other activities closely related to railroading provide good authority for the decision of this case.

Commencing in section III of appellant's Brief, appellant argues that the so-called terminal company cases are better authority for a decision in this case than are the express company cases.

The first thing to be noted about such a contention is that it tacitly acknowledges the judicial and congressional recognition and separate treatment of all the various areas of activities closely related to railroading, of which terminal companies and express companies are illustrative. Such an argument is directed not at Pacific Fruit Express Company individually but at refrigerator car companies generally.

There is no need, however, in the decision of this case to refer to either the terminal company or express company cases. As pointed out heretofore, the courts early recognized refrigerator car companies as a distinct type of activity, a distinction which has been accepted by Congress in its legislative formulations, and there is an established body of authority recognizing refrigerator car companies as not subject to the FELA. This court in affirming *Gaulden* and the third circuit in *Hetman v. Fruit Growers Express Company,* 346 F.2d 947 have announced the rule that refrigerator car companies are not subject to the FELA. There is thus no need to refer to cases or legislation affecting any other separate area of activity and no need to indulge in considerations of whether the similarities between one area of activity and another are sufficient to afford a guidance for decision in this case.

Appellant relies extensively on *Parden v. Terminal Railroad of Alabama Docks Department,* 377 U.S. 184, 84 Sup. Ct. 1207, 12 L.Ed.2d 233. A brief reference to this case will indicate the desperation of appellant's argument in present-

ing authorities on this subject. The question at issue in that case concerned the State of Alabama's constitutional immunity from suit. That no other question was at stake is shown by the manner in which the question was raised. The respondent, the State of Alabama, appeared specially and moved to dismiss the action on the ground that the railway was the agency of the state and the state had not waived its sovereign immunity from suit. The District Court granted the motion on that ground and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court of the United States reversed, but only on the question of the immunity of the State of Alabama. Apparently it was conceded that if not immune, respondent's operations would be those of a common carrier by rail subject to the FELA. At any rate, aside from a paragraph at the beginning of the court's opinion, there is no discussion or analysis of this subject.

CONCLUSION

Appellant states that, "appellee cannot be heard to claim that it is exempt from the Federal legislation involved herein. If appellee were so exempt and immune, then *a fortiori* it would come within the scope of parallel state legislation." (Page 27).

The affidavit of W. G. Cranmer offered in support of the motion for summary judgment in the court below shows that pursuant to the Workmen's Compensation laws of the State of California appellant Elisha Edwards has been furnished a great deal of medical care and paid a significant amount of workmen's compensation benefits.

It thus appears that in fact appellee has functioned "within the scope of parallel state legislation." In the words of the Court in *Aguirre v. Southern Pac. Co.*, 232, Cal.App. 2d 636, 43 Cal.Rptr. 73 page 649: "These employees have, during all of those years, been working under, and enjoying

the benefits of workmen's compensation laws of California and of the other states in which P. F. E. operates (not the least of which benefits is compensation for all employment-induced health and accident casualties regardless of proof of negligence.) We would not lightly conclude that Congress, in the enactment of Section 55 of F. E. L. A., intended that the 4,000 employees of a large corporation now operating independently and legally as a non-railroad must suddenly be required to switch from the system of state workmen's compensation laws to the Federal Railroad Employees system, a transfer inevitably brought with hardship upon both employees and employers occasioned by readjustment . . ."

In the words of Judge Goodman, in *Gaulden v. Southern Pac. Co.,* 78 F.2d 651, page 657: "It is not amiss to point out that plaintiff is not without redress for his injuries. The benefits of the Workmen's Compensation Act of California are available to him. It is not for the courts to extend the coverage of the Liability Act into new fields. During the forty year life of the Employers' Liability Act, Congress, while liberalizing its benefits, has not seen fit to extend the scope of the statute beyond railroading in its true sense."

Appellee respectfully submits that the statutory history and case authorities show that refrigerator car companies are not and should not be subject to the Federal Employers' Liability Act. Appellee further submits that its activities have been shown to be those of a refrigerator car company and have not significantly changed from those established in prior adjudications which hold it not subject to the F. E. L. A. The judgment of the Court below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD O. ROY